U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for March 10, 2023

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BOARD DECISION

Appellant: Jessie McCray
Agency: Department of the Army,
Decision Number: 2023 MSPB 10
Docket Number: AT-1221-20-0134-W-1
Issuance Date: March 7, 2023
Appeal Type: Individual Right of Action (IRA)

PROTECTED DISCLOSURES
PROTECTED ACTIVITIES

The appellant was employed as a GS-12 Human Resources Specialist with the agency. He filed administrative grievances in May and July 2018. The May 2018 grievance included allegations that his supervisor discriminated against a disabled coworker. With the second grievance, he submitted information on other employees' time off awards (TOAs). Effective October 3, 2018, the agency suspended the appellant for 5 days for his misuse of TOA information. He filed a Board appeal challenging the suspension, which was dismissed for lack of jurisdiction. Effective October 14, 2018, the agency reassigned the appellant to a new position for which he had previously applied and been selected. In February 2019, the appellant filed a whistleblower complaint with the Office of Special Counsel (OSC) involving the aforementioned incidents. After OSC closed his complaint, the appellant filed the instant individual right

of action (IRA) appeal, reasserting the same claims.

In an initial decision on the written record, the administrative judge dismissed the IRA appeal for lack of jurisdiction, finding that the appellant exhausted his remedies with OSC but that he did not nonfrivolously allege that his purported protected activities were a contributing factor in the agency's actions—his grievances did not constitute protected activity under 5 U.S.C. § 2302(b)(9)(A)(i), i.e. they did not seek to remedy a violation of section 2302(b)(8), and all of the alleged personnel actions occurred before his October 2018 Board appeal of his 5-day suspension.

The appellant filed a petition for review. Based on his challenges and the nature of his claims, the Board identified the relevant issue on review as whether the appellant nonfrivolously alleged a protected disclosure or activity under section 2302(b)(8), (b)(9)(B) or (b)(9)(C).[1]

Holding: The appellant's alleged disclosures of disability discrimination were not a basis for finding jurisdiction under 5 U.S.C. § 2302(b)(8).

1. The Board found that, assuming as true the appellant's facially plausible claim that he disclosed disability discrimination in his May 2018 grievance, such disclosure cannot support a finding of jurisdiction under section 2302(b)(8). Only disclosures made outside the context of a grievance right granted by law, rule, or regulation are protected thereunder.
2. Furthermore, the Board determined that, even if made outside of the context of the administrative grievance process, the appellant's claims of reprisal for disclosing disability discrimination were protected under the Rehabilitation Act and that the Board's IRA jurisdiction does not extend to reprisal for complaining of practices made unlawful by the Rehabilitation Act. In support thereof, the Board referenced the WPA's legislative history, longstanding case law, and the Board's recent analogous findings concerning alleged violations of Title VII in the context of IRA appeals.

Holding: The appellant did not nonfrivolously allege that his grievances were protected under 5 U.S.C. § 2302(b)(9)(B).

1. Sua sponte, the Board considered whether the appellant's grievances

[1] The Board discerned no basis for disturbing the administrative judge's findings concerning the appellant's section 2302(b)(9)(A)(i) claim and found the appellant did not raise a claim of reprisal under section 2302(b)(9)(D).

constituted protected activity under section 2302(b)(9)(B), i.e., whether, by engaging in such action, the appellant was "testifying for or otherwise lawfully assisting any individual in the exercise" of any appeal, complaint, or grievance right.
2. The Board found that, rather than lawfully assisting another in exercising their rights, the appellant instead was exercising his own right to file a grievance; therefore, that activity was not protected under section 2302(b)(9)(B).

Holding: The appellant did not nonfrivolously allege that his grievances were protected activity under 5 U.S.C. § 2302(b)(9)(C).

1. Because all of the relevant events occurred after the amendments to section 2302(b)(9)(C) by the 2018 National Defense Authorization Act (NDAA), Pub. L. No. 115-91, 131 Stat. 1283, 1618 (2017), the Board, sua sponte, considered whether the appellant's administrative grievances fell within the expanded scope of that subsection.
2. The 2018 NDAA amended section 2302(b)(9)(C) to provide that, in addition to the Inspector General of an agency or the Special Counsel, a disclosure to "any other component responsible for internal investigation or review" also is protected.
3. The Board declined to interpret the full scope of the new phrase "component responsible for investigation or review," instead reaching a finding on narrower grounds. The Board concluded that the appellant's disclosures in his administrative grievance cannot fall within the expanded scope of section 2302(b)(9)(C) because they fell within section 2302(b)(9)(A)(ii). To construe the phrase as encompassing the appellant's disclosures would allow section 2302(b)(9)(C) to effectively subsume section 2302(b)(9)(A), and (b)(9)(A)(ii) in particular, contravening Congress's carefully considered statutory scheme and the principle that provisions of a statute should be read together to avoid rendering any provision inoperative or superfluous.

Accordingly, the Board denied the appellant's petition for review and found the Board lacked jurisdiction over the appellant's IRA appeal.

PRECEDENTIAL COURT ORDER

Petitioner: Mark Edenfield
Respondent: Department of Veterans Affairs
Tribunal: U.S. Court of Appeals for the Federal Circuit
Case Number: 2021-2001
Docket Number: AT-1221-19-0440-W-2
Issuance Date: March 7, 2023

ATTORNEY FEES

The Board denied the appellant's request for corrective action in his individual right of action (IRA) appeal for failure to establish that he made a protected disclosure under 5 U.S.C. § 2302(b)(8). In a precedential opinion, *Edenfield v. Department of Veterans Affairs*, 54 F.4th 1357 (Fed. Cir. 2022), the court reversed the Board's decision, finding that the appellant proved he made a protected disclosure, and remanded the matter to the Board for further adjudication. In connection therewith, the petitioner filed an application with the court for appellate attorney fees and costs under the Whistleblower Protection Act, specifically, 5 U.S.C § 1221(g).

1. The court held that, under the doctrine of sovereign immunity and Federal court rules, the court cannot order an award of corrective action in an IRA appeal unless expressly authorized by law.

2. The court further held that section 1221 clearly provides for the award of corrective action, including attorney fees and costs, in IRA appeals brought before the Board and appealed to the court from the Board; however, it does not grant the court the authority to award such relief. Strictly construed, section 1221 grants only the Board the authority to order corrective action in such cases.

3. The court rejected the petitioner's arguments that the court was the proper forum for his attorney fees petition. The court disagreed with the petitioner's apparent analogy to the Equal Access to Justice Act (EAJA) because the EAJA, unlike the WPA, contains language expressly allowing the court to grant an award of attorney fees. To the petitioner's argument that the court may exercise the authority to award attorney fees because the relevant statutory provisions and regulations are silent on the issue, the court reiterated that such authority must be expressly provided for.

Accordingly, in a per curiam order, the court denied the petitioner's application for an award of appellate attorney fees and costs.